Supreme Court, U.S.
FILED
MAY 3 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October 1970 Term

~~1 0 7 4 1~~ 70-145

THOMAS L. WOOLDRIDGE - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

APPENDIX B TO PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

BRITTON P. FRANKLIN
1001 Republic Building
Louisville, Kentucky 40202
Attorney for Petitioner

WESTERFIELD-BONTÉ CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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EXCERPTS FROM KENTUCKY REVISED STATUTES

433.240 [1256] Taking or damaging property unlawfully but without felonious intent.

Any person who, unlawfully but without felonious intent, takes, carries away, defaces or damages any property or thing of value not his own shall be fined not less than ten dollars nor more than two thousand dollars.

* * * * * * *

433.120 [1159] Robbery; burglary; possession of burglarious tools.

(1) Any person guilty of robbery or burglary shall be confined in the penitentiary for not less than two nor more than ten years.

(2) Any person who has possession of any tools, implements or other things used by burglars for housebreaking, forcing doors, windows, locks or buildings or other places where goods, wares, merchandise or money is kept, with the intention of using them burglariously shall be confined in the penitentiary for not less than two nor more than ten years.

* * * * * * *

29.280 [2247] Supplying deficiency in petit jury; bystanders.

(1) At the time of selecting the petit juries from the list of names drawn from the drum for that purpose, if there fail to attend or be excused by the court for good cause, such a number as will not leave the number of jurors required, the judge shall draw from the drum, in open court, double the number of names to supply the places of those excused and those failing to attend, and the jurors so drawn shall be summoned by the sheriff. If any of those so drawn and summoned are likewise excused or fail to attend, the judge shall again draw from the drum, in open court, double the number of names to supply their places, and so on until the requisite number is obtained. If at any time during the term it becomes necessary to supply one or

more jurors, double the number of names necessary for supplying their places shall be drawn from the drum and summoned by the sheriff. If the number of vacancies does not exceed three, the judge may direct the sheriff to summon bystanders to supply the vacancies, instead of drawing additional names from the drum.

(2) If in any civil action called for trial the panel is exhausted by challenge, the judge may supply such jurors by drawing from the drum, or may direct the sheriff to summon for the trial of that action not exceeding three bystanders to fill such vacancies. (1962 c 234, § 61. Eff. 1-1-63.)

* * * * * * *

421.250 Procedure for procuring attendance as witnesses in this state of persons in other states.

(1) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his at- (line left out of copy at this point)
sented to a judge of a court of record in the county in which the witness is found.

(1952 c 132, §3. Eff. 6-19-52.)

(2) If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend

as a witness, same to be paid in manner that other witnesses are paid by the Commonwealth of Kentucky. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state. (1952 c 132, § 3. Eff. 6-19-52.)

* * * * * * *

The Indictment No. 6363 is in words and figures as follows:

LINCOLN CIRCUIT COURT

No. 6363

May Term, 1968

Commonwealth of Kentucky - - - - Plaintiff

v.

Ira J. Haynes and
Thomas Lee Wooldridge - - - - - Defendants

INDICTMENT

KRS 433.180
433.190
433.240
433.120(2)
437.110(2)

The Grand Jury Charges:

Count 1. On or about April 12, 1968 in Lincoln County, Kentucky, the above named defendants broke and entered the dwelling house of J. M. Mink or part thereof or outhouse belonging to and used with said dwelling house with intent to steal;

Count 2. On or about April 12, 1968 in Lincoln County, Kentucky, the above named defendants broke and entered the storehouse of J. M. Mink with intent to steal;

Count 3. On or about April 12, 1968 in Lincoln County, Kentucky, the above named defendants unlawfully defaced or damaged a pay telephone owned by Southern Bell Telephone and Telegraph Co.;

Count 4. On or about April 12, 1968 in Lincoln County, Kentucky, the above named defendants possessed tools, implements or other things used by burglars for housebreaking forcing doors, windows, locks or buildings or other places where goods, wares, merchandise or money is kept, with the intention of using them burglariously;

Count 5. On or about April 12, 1968 in Lincoln County, Kentucky, the above named defendants confederated or banded themselves together and went forth for the purpose of molesting, damaging or destroying property of Southern Bell Telephone and Telegraph Company.

Against the Peace and Dignity of the Commonwealth of Kentucky.

A True Bill
/s/ Henry Siler
Foreman

Indictment No. 6363

Commonwealth of Kentucky

v.

Ira J. Haynes
Thomas Lee Wooldridge

INDICTMENT FOR HOUSEBREAKING, ETC.

Received from the foreman of the Grand Jury in the presence of the Grand Jury and filed in open Court this 27 day of May, 1968.

/s/ Mary Gaunce
Clerk

Commonwealth Order Book No. 16, Page 304—May 29, 1968—Order on Arraignment Entered, same in words and figures as follows:

Indictment No. 6363

Commonwealth of Kentucky - - - Plaintiff

v.

Ira J. Haynes
Thomas Lee Wooldridge - - - - Defendants

ORDER ON ARRAIGNMENT

The defendants being on bond and being before the Court on arraingment, and represented by their attorneys,

Cabell D. Francis and Ben K. Wilmot, plead not guilty to the charge of housebreaking etc., five counts, and the Court being advised, it is ordered that this prosecution be and the same is set down for trial on Monday June 17, 1968.

/s/ Delbert Eagle, Judge

Commonwealth Order Book 16, Page 333—October 19, 1968—Order entered for return of prisoner, in words and figures as follows:

Criminal Action No. 6363

Commonwealth of Kentucky - - - - Plaintiff

v.

Thomas L. Wooldridge - - - - Defendant

ORDER FOR RETURN OF PRISONER IRA J. HAYNES

Motion having been made by counsel for defendant, and the Court having heard arguments and statements of counsel in behalf of Commonwealth of Kentucky and in behalf of defendant, and it appearing that Ira Jim Haynes is a co-defendant with this defendant in the indictment heretofore returned by the Lincoln County Grand Jury, and that the trial of this defendant and Ira Jim Haynes is set for November 18, 1968, in this Court, and it appearing that said Ira Jim Haynes is an essential witness to the case of defendant, Thomas L. Wooldridge, and the Court being sufficiently advised:

It Is Hereby Ordered that said Ira Jim Haynes be brought to the Lincoln County Jail not later than November 12, 1968, and confined in the Lincoln County Jail until after the trial of this defendant and Ira Jim Haynes is held

and pending further orders of this Court for the purpose of being tried as a defendant and for the purpose of testifying as a witness for the defendant, Thomas C. Wooldridge.

Entered this 19th day of October, 1968.

/s/ Delbert Eagle
Judge of Lincoln Circuit Court

Seen and Agreed to:

/s/ Harris C. Rhodes
Atty. for Commonwealth

/s/ Cabell D. Francis
Atty. for Defendant

November 14, 1968—Defendant's motion for continuance filed, same in words and figures as follows:

Commonwealth of Kentucky - - - - Plaintiff

v.

Thomas C. Wooldridge - - - - - Defendant

TO: Hon. Harris Rhodes
Attorney at Law
Courthouse
Stanford, Kentucky
Hon. W. A. Wickliffe
Attorney at Law
Harrodsburg, Kentucky

NOTICE OF DEFENDANT'S MOTION FOR CONTINUANCE

NOTICE

Please take notice that the following motion will be brought on for hearing before the Hon. Delbert Eagle,

Judge of the Lincoln Circuit Court at the hour of 9:00 A.M. Friday, November 15, 1968, in the Lincoln Circuit Courtroom Stanford, Kentucky.

MOTION

Comes the defendant, by counsel, and moves the Court for the entry of an order continuing the trial of defendant herein and in support of said Motion states that the only witness in behalf of defendant in this matter to wit: Ira J. Haynes, is now in the United States Penitentiary at Terre Haute, Indiana; that said Ira J. Haynes is an essential witness to the presentation of the case for defendant herein; that the Court has heretofore, on October 19, 1968, ordered that said Ira J. Haynes be brought to Lincoln County for the purpose of testifying as a witness for this defendant; that the county officials, through its County Attorney has verbally declined and refused to pay the cost of returning said Ira J. Haynes to Lincoln County for the purpose of testifying in this matter; that this defendant is without sufficient funds to pay the cost of returning said Ira J. Haynes to Lincoln County; that the testimony of said Ira J. Haynes can be secured at a future time; that the testimony of Ira J. Haynes is material to the defense of this defendant and could well effect the outcome of the trial; that the testimony which Ira J. Haynes would give is unavailable from any other source; and that this defendant has exercised good faith and deligence in attempting to secure the testimony of Ira J. Haynes; that to require the *Court* to pay the cost of returning said Ira J. Haynes to Lincoln County for the purpose of testifying in the trial of Thomas C. Wooldridge would be placing an undue burden on this defendant, especially where said Ira J. Haynes is a co-defendant and charged with the same crime as this defendant; and the county should be ordered to pay the cost of returning this witness to Lincoln County for the purpose of testifying in the matter as they would in all

probability try said Ira J. Haynes on the next occasion he is present in Lincoln County.

/s/ Cabell D. Francis
Attorney for Defendant

Service had of the foregoing by mailing a true copy of same to Hon. Harris C. Rhodes, County Attorney, Stanford, Kentucky, and Hon. W. A. Wickliffe, Commonwealth Attorney, Harrodsburg, Kentucky, this the 14th day of November, 1968.

/s/ Cabell D. Francis
Attorney for Defendant.

Commonwealth Order Book No. 16, Page 333—Nov. 15, 1968—Order continuing as to Haynes and overruling Wooldridge's Motion for continuance, same in words and figures as follows:

Indictment No. 6363

Commonwealth of Kentucky - - - - Plaintiff

v.

Ira J. Haynes
Thomas Lee Wooldridge - - - - - Defendants

ORDER OVERRULING MOTION FOR CONTINUANCE

On motion of the Commonwealth, the above number indictment having been set for trial as to both defendants on Monday November 18, 1968, the Commonwealth electing to proceed against the Defendant Wooldridge, at said time and place, the charge against the defendant, Ira J. Haynes, is hereby continued to February Term, 1968. Motion of

Defendant, Thomas L. Wooldridge, is overruled. This Nov. 15, 1968.

/s/ Delbert Eagle
Judge of Lincoln Circuit Court

Nov. 18, 1968—Defendant's affidavit for continuance filed, same in words and figures as follows:

LINCOLN CIRCUIT COURT

Criminal Action No. 6363

Commonwealth of Kentucky - - - Plaintiff

v.

Thomas L. Wooldridge - - - - Defendant

DEFENDANT'S AFFIDAVIT FOR CONTINUANCE

Comes the Affiant, Thomas C. Wooldridge, and after being duly sworn, states as follows:

1. That he is the defendant in the case of Commonwealth v. Thomas C. Wooldridge in the Lincoln Circuit Court, Criminal Action No. 6363.

2. That the only witness in his behalf in this matter is Ira J. Haynes;

3. That he has been informed that said Ira J. Haynes is confined in the United States Penitentiary at Terre Haute, Indiana;

4. That he understands that it would be necessary for him to pay the expenses of said Ira J. Haynes, plus the expenses of a Federal Marshal to and from Stanford, Kentucky, for the purpose of having said Ira J. Haynes present to testify in his behalf.

5. That he understands that the expenses would be approximately $250.00 or $300.00;

6. That he is without funds with which to pay said expenses;

7. That said Ira J. Haynes is an essential and material witness to the presentation of Affiant's defense in this matter;

8. That if said Ira J. Haynes were present, he would testify that they stopped at the Golden Gate Motel for the purpose of making a long distance telephone call;

9. That the Affiant does not believe that he would get a fair and impartial trial without the presence of said Ira J. Haynes to personally testify and that he does not believe that he can get a fair presentation of his defense to the jury by the reading of an Affidavit as to what Ira J. Haynes would testify if present to testify in person.

Witness the hand of Affiant, this the 18th day of November, 1968.

/s/ Thomas L. Wooldridge

State of Kentucky)
County of Lincoln) ss.

Subscribed and Sworn to before me by Thomas C. Wooldridge, this the 18th day of November, 1968.

/s/ Ben K. Wilmot
Notary Public, State at Large,
Kentucky

My commission expires 8-15-70.

Nov. 19, 1968—Affidavit of Defendant's Attorney, in words and figures as follows:

LINCOLN CIRCUIT COURT

Criminal Action No. 6363

Commonwealth of Kentucky - - - - - Plaintiff

v.

Thomas C. Wooldridge - - - - - - Defendant

AFFIDAVIT OF DEFENSE ATTORNEY

Comes the Affiant, Cabell D. Francis, and after being duly sworn, states as follows:

That he is the attorney for the defendant in this matter;

That he caused a subpoena to be served upon the Hon. Leonard Boone, Judge, Lincoln County, Kentucky, to appear and testify in this matter on the 19th day of November, 1968;

That said Leonard Boone is absent and failed to appear in response to said subpoena;

That if present, he would testify that the search warrant issued by him in this matter was not presented to him for his signature until sometime after 9:00 A.M. on the morning of April 12, 1968.

/s/ Cabell D. Francis

State of Kentucky }
County of Lincoln } ss

Subscribed and Sworn to before me by Cabell D. Francis, this the 19th day of November, 1968.

/s/ Ben K. Wilmot
Notary Public,
State at Large, Kentucky
My Commission expires August 15, 1970.

November 19, 1968—Order on Jury Trial entered Commonwealth Order Book No. 16, page 345, in words and figures as follows:

LINCOLN CIRCUIT COURT

Indictment No. 6363

Commonwealth of Kentucky - - - - - Plaintiff

v.

Thomas Wooldridge - - - - - Defendant

ORDER ON JURY TRIAL

This prosecution having been set down for trial on Monday November 18, 1968, and having been continued to this date, came on for trial; and the defendant being present in open court and represented by his attorney, Cabell D. Francis, and the Commonwealth being represented by Harris C. Rhodes, County Attorney, and W. A. Wickliffe, Commonwealth Attorney, both sides announced ready. There-

upon, the following jury was duly selected, qualified, empaneled and sworn to try the issues joined.

Vernon Brown	Everett Cowan	Hubert Smith
Burdette Bright	A. J. Osborne	Robert Y. Hatfield
Ernest Brock	Leroy Tillett, Jr.	William B. Stevens
Russell Blankenship	Robert Hicks	Edwin Gutenson

The Court Reporter was called to take down the proceedings of the within trial, and she appeared and proceeded to report same.

It not being possible to complete this trial on this date, the jury was duly admonished according to law, and were dismissed until nine o'clock A.M. the following day, Wednesday November 20, 1968.

The jury having appeared and resumed their seats in the jury box on Wednesday November 20, 1968 at nine o'clock A.M., and after hearing the reading of the Indictment, charging the defendant with Count 3: On or about April 13, 1968 unlawfully defaced or damaged a pay telephone owned by Southern Bell Telephone & Telegraph Co., and Count 4: On or about April 12, 1968 possessed tools, implements or other things used by burglars for housebreaking forcing doors, windows, locks or buildings or other places where goods, ware(merchandise or money is kept, with the intention of using them burglariously; the evidence presented by both sides, the instructions of the Court and the arguments of Counsels, retired to their room to consider a verdict, and after time spent therein deliberating, returned into Court and reported the following verdict:

"We, the jury find the defendant guilty as charged under Instruction No. 1, and fix his punishment at confinement in the penitentiary for 5 years.

/s/ Burdette Bright
Foreman

"We the jury find the defendant guilty as charged under Instruction No. 2, and fix his punishment at a fine of $500.00.

/s/ Burdette Bright
Foreman

It is ordered that the Commonwealth of Kentucky recover of the defendant, Thomas Wooldridge, the sum of Five Hundred Dollars ($500.00), and that he be remanded to the custody of the Jailer of Lincoln County. Counsel for Defendant having made motion that the defendant be allowed to continue on his present bond until the Court rules on said motion and grounds for new trial, and the Court being advised sustains the motion.

It appearing that the Commonwealth moved that Count 2 of the indictment be amended to substitute "Southern Bell Telephone & Telegraph Co." for the name of "J. M. Mink," and the Court being advised said motion was sustained.

It is further ordered that upon motion of the Commonwealth Counts 1, 2, and 5 be and same are dismissed.

/s/ Delbert Eagle
Judge

Nov. 23, 1968—Defendant's Motion and Grounds for New Trial filed, same in words and figures as follows:

LINCOLN CIRCUIT COURT

Criminal Action No. 6363

Commonwealth of Kentucky - - - - Plaintiff

v.

Thomas L. Wooldridge - - - - - - Defendant

DEFENDANT'S MOTION AND GROUNDS FOR NEW TRIAL

Comes the defendant, by counsel, and makes this his Motion for the granting of a new trial in this matter and as grounds for said Motion states as follows:

1. That the Court erred in its ruling on defendant's motions for a continuance, the effect of such rulings being to place an undue burden upon this defendant resulting in a denial of the due process of law to which the defendant is entitled.

2. That the Court erred in the procedure used in selecting the twelfth juror, procedure being used being contrary to the provisions of KRS 29.280 as modified by the Rules of Criminal Procedure 9.30.

3. That the Circuit Court Clerk obviously did not have the sufficient number of jurors in the box from which to draw names to try the defendant at the time the selection of jurors was began. Since the defendant used only eleven strikes and the Commonwealth used only one strike and only three people were exhausted for cause and there were

only eleven jurors sated when the panel was exhausted and the counsel of defendant was not advised of the insufficient number of names until after said names had been exhausted.

4. That the Court erred in its rulings on defendant's objections to the use of and admission into evidence of all items taken from defendant's automobile in his absence and after the automobile had been out of defendant's possession for more than nine hours during the time the automobile had not been placed under guard or direct supervision by any official, all of which rulings being in violation of defendant's constitutional right and against defendant's constitutional guarantees.

5. That the Court erred in refusing to allow counsel for defendant to interrogate prosecuting witness Sheriff James Harris concerning the bank deposit book removed from defendant's automobile.

6. That the Court erred in its instructions to the jury, said instructions being incomplete, erroneous, and prejudicial to defendant's rights herein.

7. That the conviction is based on erroneous and false testimony.

8. That the conduct of certain of the prosecuting witnesses and officials amounted to misconduct which cast certain inferences and reflections adverse to and prejudicial to the rights of defendant herein.

9. That the short-term arrest or detention of one John Doe in the courtroom in the presence of the jury by a Deputy Sheriff pursuant to the orders of the Court was prejudicial to defendant receiving a fair trial.

10. That the Court erred in refusing to allow the jury to view the scene of the crime.

11. That the Court erred in refusing to dismiss Count #3 of the indictment charging this defendant with damaging property when there was no showing of the condition of said property prior to the date of the alleged offense.

12. That the Court erred in allowing the introduction of Commonwealth's exhibit #1 for the reason that same was not in the condition in which it was found, following the alleged offense for which this defendant was indicted and, in fact, had been damaged and taken apart by agents or employees of owners of said exhibit.

/s/ Cabell D. Francis
Attorney for Defendant

/s/ Ben K. Wilmot
Attorney for Defendant

By /s/ Cabell D. Francis

NOTICE OF MOTION

Notice Is Hereby Given that the foregoing Motion for Grounds for New Trial will be heard before the Lincoln Circuit Judge Friday, December 20, 1968, at the hour of 9:00 a.m. in the Lincoln Circuit Courtroom, Stanford, Kentucky.

/s/ Cabell D. Francis
Attorney for Defendant

Service Had of the foregoing by mailing a true copy of same to Hon. Harris C. Rhodes, Stanford, Kentucky, and Hon. W. A. Wickliffe, Harrodsburg, Kentucky, Attorneys for Plaintiff, this the 23 day of November, 1968.

/s/ Cabell D. Francis
Attorney for Defendant

1968—Dec. 14—Notice of Hearing filed, in words and figures as follows:

LINCOLN CIRCUIT COURT

Indictment No. 6363

Commonwealth of Kentucky - - - Plaintiff

v.

Thomas Wooldridge - - - - - - Defendant

COURT'S NOTICE OF HEARING

The defendant herein having been heretofore convicted of feloniously and illegally possessing burglary tools, and his sentence having been determined to be five years in the penitentiary, and his counsel having heretofore filed herein motion and grounds for a new trial, Now, the defendant and counsel are hereby notified that the court will act and rule upon said motion and grounds for a new trial at the next regular Rule Day of this Court, Friday, December 20, 1968, at which time counsel may be heard if they so desire to be heard.

At the same time the court will entertain a motion to be made by the Commonwealth to increase the bond in the event the defendant desires to effect an appeal to the Kentucky Court of Appeals.

/s/ Delbert Eagle
Judge, Lincoln Circuit Court

Jan. 17, 1969—Order and Ruling of Court entered Commonwealth Order Book No. 16, Page 365: Same in words and figures as follows:

LINCOLN CIRCUIT COURT

Commonwealth of Kentucky - - - - Plaintiff

v.

Thomas Wooldridge - - - - - - Defendant

ORDER AND RULING OF COURT ON MOTION AND GROUNDS FOR NEW TRIAL

The Court having duly considered the motions and grounds for a new trial herein including argument of counsel, overrules said motion and grounds. The court determines and sets the bond of the said defendant at the sum of Seven Thousand ($7,000.00) Dollars. To all of which counsel object and take exception.

/s/ Delbert Eagle
Judge, Lincoln Circuit Court

* * * * * * *

January 17, 1969, Commonwealth Order Book No. 16, Page 365—Order of Judgment and Sentence Entered, in words and figures as follows:

LINCOLN CIRCUIT COURT

Indictment No. 6363

Commonwealth of Kentucky - - - - Plaintiff

v.

Thomas Wooldridge - - - - - Defendant

JUDGMENT AND SENTENCE

The defendant herein having been indicted by the Grand Jury of Lincoln Circuit Court of the charge of possession of burglary tools and defacing private property.

Whereupon the defendant was arraigned and through counsel plead "not guilty," and his case was set down for a jury trial on November 19, 1968.

Upon the said trial date both Commonwealth and the defendant announced ready for trial, whereupon, the following jurors were called, sworn and duly empaneled to try the issues joined:

Vernon Brown	Leroy Tillett, Jr.
Burdette Bright	Robert Hicks
Ernest Brock	Hubert Smith
Russell Blankenship	Robert Y. Hatfield
Everett Cowan	William D. Stevens
A. J. Osborne	Edwin Gutenson

After the hearing of proof, instructions of the court and argument of counsel, the said jury retired to reach a

verdict and after due deliberation returned into court and announced the following verdict:

"We, the jury find the defendant guilty as charged under Instruction 1, and fix his punishment at confinement in the penitentiary for 5 years.

/s/ Burdette Bright
Foreman

We the jury find the defendant guilty as charged under Instruction No. 2, and fix his punishment at a fine of $500.00.

/s/ Burdette Bright
Foreman"

Whereupon, the defendant having been found guilty he is adjudged guilty by the court and his punishment fixed at confinement in the State Penitentiary at LaGrange, Ky. for a period of five (5) years, and that the Commonwealth of Kentucky recover of the defendant the sum of Five Hundred Dollars.

Whereupon, counsel for the defendant moved the court for probation, and the defendant was allowed to continue on his bail bond pending determination of said motion, after investigation and report of the Probation Officer.

The probation officer having reported herein and from the said investigation the court denies the defendant probation.

Thereafter and on the 17th day of January, 1969, the said defendant was brought before the open court, in the presence of counsel, and the court having duly requested of the defendant if he had cause to show why sentence should not be pronounced upon him, and there being no sufficient cause to the contrary being shown or appearing to the court, it is adjudged that the defendant is guilty as charged, and he is hereby committed to the Sheriff of

Lincoln County, Kentucky, to be carried to the State Penitentiary at LaGrange, Kentucky, and there confined for a period of two years at hard labor.

The defendant having filed herein a motion and grounds for a new trial, which motion and grounds are overruled by the court, to all of which counsel objects and takes exception and prays an appeal to the Court of Appeals of Kentucky.

/s/ Delbert Eagle
Judge, Lincoln Circuit Court

Attest: /s/ Mary Gaunce, Clerk

* * * * * * *

LINCOLN CIRCUIT COURT

Commonwealth of Kentucky - - - Plaintiff

v.

Thomas Lee Wooldridge - - - - Defendant

TRANSCRIPT OF EVIDENCE ON APPEAL

Before the Hon. Delbert Eagle, Judge, and a Jury, November 19 & 20, Stanford, Kentucky.

Appearances:

For the Commonwealth:
Hon. W. A. Wickliffe
Commonwealth Attorney
13th Judicial District
Hon. Harris Rhodes
Lincoln County Attorney
Stanford, Kentucky

For the Defendant:
Hon. Cabell Francis
and
Hon. Ben K. Wilmot
Stanford, Kentucky

(In chambers, and before the selection of a jury:)

Mr. Francis: The defendant filed an affidavit requesting a continuance because of the failure of County Judge Leonard Boone to respond to a subpoena to testify as to the time he had drawn a search warrant and as to the time the said search warrant was executed and served upon the defendant, at which time the Court took up the essence of the

search warrant, and the defendant cited Ross v. Commonwealth, 275 S. W. 2d 424, which held that a search of an automobile twelve to fifteen hours after an accident, and not in the presence of the defendant, that that evidence was not admissible. In that case, the automobile was out of the possession or supervision of the defendant, just as it was in this case.

The Court, after having read the affidavit and the search warrant, ruled that the search warrant was not defective in that it properly described the automobile and the items searched for, to all of which the defendant objected, and the same was overruled.

The defendant further filed an affidavit that the co-defendant Ira J. Haynes was in the Federal Penitentiary at Terre Haute, Indiana, and made the motion for the Commonwealth to transport said Haynes to testify on the trial because the said Thomas Lee Wooldridge did not have funds in order to bring him to testify on his behalf. Whereupon, the Court, after reading the affidavit and both motions for continuance, overruled the motions for continuance, to all of which the defendant objected. Said ruling was made after he had already entered an Order in October directing that the said Ira Haynes be returned to Lincoln County not later than November 12, 1968, and confined in the Lincoln County jail pending the trial of the above styled action.

The Court: He is able to hire two attorneys; he is able to pay a bonding company to make a $10,000 bond. He has had plenty of notice as to the time for his trial. If he is able to hire two attorneys to represent him and able to pay a bondsman to come in here and make a $10,000 bond, that would refute his statement in the affidavit that he is not financially able to secure this witness who is in the federal pen in Indiana. He has made no effort on his own part to obtain the witness and he has relied wholly and solely upon the Court to bring him back here as a defense witness.

If he is financially able, and everything would indicate that he is, it is his duty to procure his own witnesses and to have them here. For all of those reasons, the Court has refused to continue this case. There is no evidence and there is nothing that this man has done or said that would indicate that if this case were put off to next court he would be in any better position so far as this witness is concerned than he is right now, because he has made no effort on his own part to have the witness here. The Court, in response to the request, made an investigation of the federal officials necessary to bring the witness back here, and that is about as far as the Court feels it can go. As to the situation relative to the County Judge, if counsel for the defendant wants to make an affidavit that the matter of the time when the search warrant was issued is so necessarily a part of the proof, then the Court will consider the matter of getting the Judge here providing there is no other way to prove it, but there was present the county attorney and there was present, no doubt, the Judge's secretary.

Mr. Francis: If you gentlemen will stipulate when it was searched, that is all I want.

Mr. Wickliffe: According to the record right now, we have impugned the character of a county official. I don't like it. I don't think that should be in the record. The only matter, according to the testimony of counsel for defendant, that Judge Boone could possibly testify to or throw any light on is the time of the execution of the search warrant. That matter can be stipulated at any time that the parties have an opportunity to discuss it. This is the first time that this matter has been brought to the attention of the Commonwealth Attorney. I will, if you desire, confer with the County Attorney, the Sheriff and whoever you want to and furnish you that information.

Mr. Wilmot: Will you confer and stipulate along the lines that the search warrant was not prepared and executed until sometime on the morning of the 12th?

Mr. Wickliffe: I think the search warrant on its face would indicate approximately what time it was executed, but that is a matter that can be stipulated without any trouble. The Sheriff and the County Attorney were both present when this was done. They can both testify to the same thing that Judge Boone could testify to and I regret very much that counsel put anything in the record that in any way would impugn the character of a county official, particularly one of the character of Judge Boone. There has been no motion made to produce him; there has been no request for an Order of Arrest. The motion for a continuance does not in any way rely upon the failure of Judge Boone to be here as being a material part to the defense. The only information of the Commonwealth and the Court as regards the failure of Judge Boone being here being detrimental to the defendant's defense is the statement just made at 11:10 in the A.M. at the first hearing on this matter this date. Maybe I'm making a big issue out of it, but I regret that any county official or any member of the bar or anybody else's character would be impugned, because the statement that he refused to acknowledge a subpoena of the Circuit Court does impugn somebody's character. It indicates a complete indifference of Judge Boone to the orders of the Circuit Court in Lincoln County and, in my opinion, Judge Boone is not that type of person. I have always found him completely amenable to the orders of the Circuit Court and the few occasions that I have had to have him here or that he has been here to testify, actually he has been here all day and without any objection or without any complaint whatsoever as to the time that it has taken, and I don't think that it is fair to him and I would like—I don't know exactly how the Court could do it, but I regret it is in the record and I think it should be removed. As far as the other motions made for a continuance, it would be well that the record show that some time prior to the setting of

this case, the Commonwealth elected to try only the defendant Wooldridge, which we are attempting to do on this occasion. The Commonwealth, together with the defendant and defendant's counsel all are aware that the co-defendant Ira J. Haynes is in the federal penitentiary, I believe in the State of Ohio. No motion having been made by Haynes to have his case tried, the Commonwealth elected to try against only the defendant Wooldridge; therefore, no surprise can be claimed by the defendant Wooldridge at this time. Thereafter, an order was asked for directing that the defendant Haynes be brought here, and the Court, in response to that motion of the defendant Wooldridge, by counsel, entered such an order, which order was prepared by counsel for the defendant and which is a part of this record. The question and the problem now is whether or not Wooldridge has made any effort pursuant to that order to get him here, and obviously, from statement of counsel this morning, no effort has been made between this date and the date that that order was entered. It is regrettable if the man now claims that he is unable financially to afford it. However, as the Court has pointed out, he has employed counsel—two, to be exact; he has afforded a paid bondsman to come here to bail him out of jail. According to the information that the Commonwealth has, this defendant Wooldridge, just a few short days or weeks ago, was residing in Utah and I assume that he was able financially to afford his transportation expense back to Kentucky. This case was set yesterday. Wooldridge was here at this time. It was continued over until today by reason of other cases previously set and tried, and he is back here again today, I assume, furnishing his own transportation, and I think the Court would be completely without right to request the county to stand the expense of bringing the witness here for a man who is obviously solvent. It is the feeling of the Commonwealth that we have done everything in

our power to accommodate the defendant and that no criticism can be had of the Commonwealth for their actions or the Court in refusing to continue the case. As regards the affidavit for the search warrant, the Commonwealth is of the opinion that it shows on its face sufficient facts to justify the issuance of the warrant; that the time element is sufficiently demonstrated and explained therein, and that it is only necessary to show within a reasonable time when it was issued. The case relating to the search warrant as furnished by the defendant has no bearing on the question at hand for the reason that in the case so cited no search warrant existed and it was immaterial whether it was twelve hours or thirty minutes after the taking possession of the vehicle that it was searched because if the defendant is not present, it is admitted and conceded that a search warrant is mandatory. In this case, the law was followed and complied with.

Mr. Francis: In answer to the statements of the Commonwealth's Attorney, the defendant, through counsel, states that by his election to try only Thomas Lee Wooldridge that the defendant was deprived of his only witness in the within action when said election was made. In answer to the question concerning the County Judge failing to respond to the subpoena, it will be agreed, if the Commonwealth and County Attorney will furnish the time at which the search warrant was issued and the Sheriff will furnish the time at which the search warrant was executed, the motion for continuance concerning the County Judge will be withdrawn. Further, by the defendant Thomas Lee Wooldridge paying the cost to bring the other man back to testify for him, he would, in turn, be paying the cost of transporting him to the State of Kentucky for a trial of the within action, which the defendant Thomas Lee Wooldridge should not be required to do by any action of the Commonwealth.

The Court: The Court, in overruling the motion of counsel for the defendant for a continuance for the cause that the County Judge was not here as a witness as per subpoena, understands that the County Judge was subpoenaed for the sole purpose of designating the time the search warrant was issued, and the Court, upon investigation of the affidavit and the search warrant, finds that the affidavit itself, dated April 12th, sets out that the automobile was in the parking lot as described therein at 10:20 EST A.M. on April 12th, the search warrant being issued apparently thereafter, or at the time, being sometime after 10:20 A.M. on that date, and the return of the Sheriff of Lincoln County showing that the car was searched pursuant to the search warrant on the 12th day of April, 1968, seems to the Court to be sufficient indication of the time of the issuance of the search warrant as related to the search itself as to be legally sufficient, and for that reason the Court overrules the motion. If you want to bring Mr. Harris in and have a pre-trial hearing as to what time he served the search warrant, the Court will be glad to do that.

* * * * * * *

(During the selection of the jury, eleven jurors having qualified and having been selected, and the regular panel having been exhausted, in order to secure the twelfth juror, it was necessary to go to the jury wheel, which was done by the Court, and a prospective juror was summoned and appeared to be examined by the Court and counsel.)

Mr. Francis: I want to ask the Court how many names were withdrawn?

The Court: Just one.

Mr. Francis: You only drew one name?

The Court: Yes, I only got one name.

Mr. Francis: At this time I make a motion to discharge

the entire panel because the statute says you have to draw twice the number of names that are needed to fill the place.

(The Court and counsel confer in chambers.)

The Court: The Court having considered the motion of counsel for defendant, overrules the same and directs that the trial proceed.

Mr. Wilmot: To which the defendant excepts.

* * * * * * *

Direct Examination by Mr. Wickliffe.

Q. 1. Give your name to the Court?

A. Carl Leathers.

Q. 2. By whom are you employed?

A. Southern Bell Telephone Company.

Q. 3. Were you so employed in April of this year?

A. Yes, sir.

Q. 4. What counties do you work in, Mr. Leathers?

A. Boyle, Lincoln, Mercer and that's all.

Q. 5. I will ask you if on last April you had occasion to be at the Golden Gate Motel here in Lincoln County for the purpose of removing a telephone?

A. Yes, sir.

* * * * * * *

Cross-examination by Mr. Francis.

Q. 1. Mr. Leathers, without looking, tell us what number is on that telephone?

A. I couldn't say—it has been a long time.

Q. 2. You say you took the money out of the phone?

A. Yes, sir.

Q. 3. Were there any coins in it?

A. Yes, sir, there was coins in it. I turned it over to the business office.

Q. 4. How many coins were in it?

A. I can't say—you can't get into the money box.

Q. 5. The money box is locked?

A. Yes, sir, it is locked with a seal.

Q. 6 The money box was sealed and intact when you took it out, wasn't it?

A. That's right, it has got a seal on it and when you pull it out, it is sealed.

Q. 7. You say something had jimmied the lock?

A. Yes, sir, it was messed up—I couldn't say what—but it was messed up.

Q. 8. So, when you couldn't get a key in it, you drilled a hole in it, didn't you?

A. That's right.

Q. 9. And what did you use to drill it?

A. Electric drill.

Q. 10. What size bit did it have in it?

A. I used two different sizes—broke one—I don't know, a quarter-inch size bit and another bit—I can't say what size.

Q. 11. So, actually, you are the fellow who did all of this drilling on there, aren't you?

A. That's right.

Q. 12. And jimmied the whole deal?

A. That's right.

Q. 13. And the plate was on the front of the telephone when you went there?

A. Yes, sir.

Q. 14. And the only thing there was that you couldn't get a key in the lock?

A. That's right.

Q. 15. Just describe the condition of the lock when you got there—was the place where you put the key in still there?

A. Yes, it was there. It was just messed up where you couldn't get a key back in it.

Q. 16. How was it messed up?

A. I can't say how it was messed up.

Q. 17. You just couldn't get a key in it?

A. It don't take much to mess one of them up where you can't get a key in it.

Q. 18. Would a bobby pin mess up one?

A. I couldn't say.

Q. 19. Or a piece of chewing gum mess up one?

A. I can't say that either.

Q. 20. Or any steel object pushed in that little hole?

A. I imagine so.

Q. 21. And you drill them all the time, don't you?

A. I have drilled more than one.

Q. 22. How many have you drilled?

A. I can't say for sure—in the last twenty years, it would be heard to say.

Q. 23. You drill them every day, don't you?

A. I could, if it come to that.

Q. 24. That is your job, isn't it?

A. That's right.

Q. 25. When they tell you they can't get a key in it, you go out and drill it?

A. That's right.

Q. 26. And you drilled this one because you couldn't get a key in it?

A. That's right.

Mr. Francis: That all.

(Witness excused.)

* * * * * * *

JAMES HARRIS, called by the Commonwealth, being first sworn, testified as follows:

Direct Examination by Mr. Rhodes.

Q. 1. Tell the jury your name?

A. Jim Harris.

Q. 2. And you are Sheriff of Lincoln County?

A. Yes, sir.

Q. 3. And were on April 12, 1968?

A. Yes, sir.

Q. 4. Mr. Sheriff, did you have a search warrant to search a car that was on the Stanford Motors Company lot that day?

A. Yes, sir.

* * * * * * *

Q. 11. Tell us what was found in the automobile?

Mr. Wilmot: Object.

The Court: Overrule the objection.

A. We found a various assortment of tools.

Q. 12. Before you go any further, have those items been in your possession since then?

A. Yes, sir, except when they were before the Grand Jury.

Q. 13. Do you know where they are now?

A. They're right here in the courtroom.

Q. 14. Will you get them and bring them around, please, sir?

Mr. Wilmot: Object to the displaying them before the jury, Your Honor.

The Court: Overrule the objection. Gentlemen, the Court rules that this search is a legal search.

A. This device here was found under the right seat. The money, $123.00, was found in the back, the truck part.

Mr. Wilmot: As an additional objection, he is displaying certain items not connected with a crime.

The Court: That has nothing to do with it, if they were found in the car. Overrule the objection.

A. (Continuing) This satchel here was found up behind the back seat—I forget what it contains, but most of these articles were labeled, and when they went before the grand jury and came back some of the labels had been taken off, but these are more or less small items here to this ef-

fect,—there is a file and various other small articles . . .

Mr. Francis: Objct to his explanation of what they are.

The Court: When you take them one by one, you can describe them and show them, but do not comment on them.

A. (Continuing) That is a file there—that is just some kind of a bolt. I don't know what you would call it, but it has a tap on it—and that I don't know what it is. This is a jaw that evidently fits into this . . .

Mr. Wilmot: Object to what it evidently does.

The Court: If you know, you can say what it is, not "evidently."

A. (Continuing) This is a jaw and I'm sure it fits into that. This is another jaw here. There is a tap and a couple of little items there—I don't know what you would call those, and five or six of those .22 shells there.

Q. 15. Will you put those items back in that bag and let's introduce that into evidence and mark it Commonwealth Exhibit 3—and will you pass that bag among the jury?

A. (Witness hands jury Exhibit 3, bag and contents.)

Q. 15. Pick up that little bag—Mr. Harris, where did you first see that bag?

A. It was in the trunk of the car.

Q. 16. Of this Oldsmobile?

A. Yes, sir.

Q. 17. Do you know whose car that was?

A. Well, it checked out to Mr. Wooldridge there at that time.

Q. 18. What kind of money is that in the bag?

A. Well, it is in change—I don't recall exactly— it is marked and we have it in separate sacks.

Q. 19. How much mony is there?

A. $123.00.

Mr. Rhodes: Mark that bag of money Exhibit No. 4.

Q. 20. Put the contents of that box on the floor and show the jury?

A. That is evidently a minnow trap and that is, of course, a sweater. Here is a box of miscellaneous tools, wrenches . . .

Mr. Rhodes: Mark the miscellaneous box of tools as Exhibit 5.

Q. 21. Show us the items in that box, Mr. Sheriff?

A. These have been identified as telephone keys . . .

Mr. Wilmot: Object to that.

The Court: Sustain that—he may introduce them, but . . . .

Q. 22. Did you find those keys in this car?

A. Yes, sir.

Q. 23. Where were they found?

A. In the ash tray of the car.

Mr. Rhodes: Let's mark those as Commonwealth Exhibit 6.

Q. 24. Let's take up another item in that box . . .

A. These are more or less just . . .

Q. 25. Now, Mr. Sheriff, show us the rest of the contents of that box—just set the articles out there on the floor so the jury can see—pick out the wrenches there and put them in a pile and then put them back in the box . . .

A. Do you want me to count them?

Q. 26. Yes, please, sir?

A. There are two or three different types here—open end, box end, and one adjustable, and there are a couple of screw drivers, two more screw drivers, and there is another one, and these are more or less sockets, and that is a punch. These are more or less points that go on a torch set.

Q. 27. What kind of torch set are you talking about?

A. Well, really, it is probably acetylene—I couldn't say positive—I'm not that familiar with torches.

Q. 28. Where in the car did you find that box of tools?

A. These were in the trunk of the car.

Q. 29. Let's refer back to the large carton there a minute—do you have any other items in that carton there that were found in the automobile?

A. All these items were found one place or the other in the automobile.

Q. 30. All right, what is that item?

A. Socket wrench (marked Exhibit 7); tire tool (marked Exhibit 8).

Q. 31. What is that you have in your hand there?

Mr. Wilmot: Object, unless he knows.

The Court: If he knows, he can tell; if he doesn't, of course, he can't tell.

A. No, I can't actually say.

Q. 32. Let's put those items back in that sack and show them to the jury. (White sack market Exhibit 9.) What else did you find?

A. This box here that contains mostly fishing tackle equipment.

Mr. Rhodes: Mark that Exhibit 10, fishing equipment.

Q. 33. Was the sack in the fishing box?

A. It evidently was.

Q. 34. What does the sack contain?

A. It contains a box of .22 shells—I don't know if it is full or not (opening the box of shells)—it has got a key in it too—first time I have noticed that—there is a key on top of that in that box. The box looks like it has never been used, that is, any of the shells out of it.

(Key found in box of shells marked Exhibit 11.)

Q. 35. Anything else?

A. This evidently is a plug-in for a transistor radio, ear plug.

Mr. Rhodes: Let's mark that Exhibit 12 and the paper bag containing the shells as Exhibit 13.

Q. 36. Show us the rest of the contents in that box?

A. This, of course, is there at the telephone . . .

Q. 37. That is part of Exhibit 1?

A. Yes, this is just a dirty cloth, a Christmas card, a deposit book from Royal Bank of Louisville, another Christmas card and a key chain.

Q. 38. Did you find anything else?

A. That's all I recall.

* * * * * * *

J. M. MINK, recalled, testified further as follows:

Direct Examination by Mr. Rhodes.

Q. 1. Mr. Mink, will you refer to that device there in front of you?

A. Yes, sir.

Q. 2. Examine it, will you please—I believe that yesterday you saw that device and it was offered as Commonwealth Exhibit 2 at the time you were on the stand, was it not?

A. Yes, sir.

Q. 3. Was there a handle with that device yesterday?

A. Yes, sir.

Q. 4. Will you carefully examine all of those articles there and see if you can find the handle that you used on that device yesterday?

A. In this box here?

Q. 5. Yes, sir, in the box or on the stand or anywhere?

A. (After looking) No.

Q. 6. Describe the handle to us as best you can?

A. The ratchet type that I placed on this yesterday was about a 12-inch ratchet and . . .

Q. 7. When you say "ratchet," describe to us what you mean?

A. The ratchet that goes in this piece of equipment right here—that will fit this opening right here, and also this opening right here—and it is the same color of this right here—it is a dark piece of metal. The part that goes in here is a dark piece of metal.

Q. 8. Did it have a handle to it, or how did it work?

A. Well, it was a ratchet that you can turn it around and around with it. I couldn't say whether it was a 2-way ratchet or not—I don't remember that,—but it is used as what you would call a ratchet that would fit this to tighten it up with.

Q. 9. Did you use that yesterday?

A. Yes, sir, I put it right in here yesterday and demonstrated it on this phone.

Q. 10. You say you located that socket where your right hand is?

A. I put the ratchet type gadget in these sockets here when it was put on this telephone like this yesterday. It fit right in these right here . . .

Mr. Francis: Object. That is prejudicial.

The Court: He may say if he did, and the jury will remember the testimony.

A. And the socket, if I may continue, was a dark metal, similar in color to this right here.

Mr. Rhodes: Nothing further.

Cross-examination by Mr. Francis.

(Mr. Francis asked for permission to go through the box of tools with the Sheriff, which he was permitted to do.)

Q. 1. Mr. Mink, I will hand you an implement marked Exhibit 2 and ask you to examine it—you are familiar with it completely?

A. Yes, I'm familiar with what all I used here yesterday.

Q. 2. I will hand you an instrument—you looked through the box—and ask you what that instrument is?

A. I don't know exactly what it would be called.

Q. 3. You have never seen it before?

A. It can be used for different things, I think.

Q. 4. I will ask you, sir, if you have ever seen this before?

A. I seen a handle similar to that in that box, yes.

Q. 5. Did you demonstrate with that handle yesterday?

A. No, sir.

Q. 6. That is not the handle you demonstrated with?

A. No, sir.

Q. 7. Why do you say that?

A. The piece is not on there.

Q. 8. I asked you if that was the handle you demonstrated with yesterday?

A. No, sir.

Q. 9. Why do you say that?

A. It is not the color of it.

Q. 10. What color was it?

A. The color of that was the color of this piece right here.

Q. 11. Does it fit that instrument?

A. I haven't tried it.

Q. 12. Will you try it, please?

A. (Trying it) No, sir.

Q. 13. I will hand you this instrument and ask you to insert that on the end of that handle and see if it fits?

A. It fits on it.

Q. 14. Does it fit in the socket on Exhibit 2?

A. Yes, it goes in there.

Q. 15. Fits perfectly, doesn't it?

A. It goes in there.

Q. 16. That is what you demonstrated yesterday as being part of Exhibit Number 2?

A. No, I don't believe it was.

Q. 17. It was the only thing in the box that fits, and it fits, doesn't it?

A. The tool that I used yesterday was a similar color of this. The color of the metal was the color of this right here that fit in these sockets and this part right here.

Q. 18. Then the part had not been misplaced?

A. I'll say this is not the piece that I had yesterday when I demonstrated this machine right here.

Q. 19. Does it fit?

A. It fits in there—it will go in there, but that is not the piece that I used yesterday.

Q. 20. That is what you call a break-down tool, isn't it?

A. I don't know what it is called.

Q. 21. And it can be dismantled at any time?

A. I don't know about that.

Q. 22. When you left the stand yesterday, the instrument you had wasn't like this—instead, it was like this, laying here for the jury to see?

A. The instrument that I had yesterday was together and I used it in this right here.

Q. 23. It is together now, isn't it?

A. Yes, sir, but it is not the piece that I had yesterday.

Q. 24. Well, Mr. Mink, you say this piece you had yesterday was a different color?

A. It was a metal color, similar to this right here.

Q. 25. I think the jury will remember what color it was—but that is the one—you testified about a wrench that would fit in that yesterday, didn't you?

A. I put a wrench in this that would fit yesterday.

Q. 26. That one fits, doesn't it?

A. It is in there—I don't know whether it fits or not?

Q. 27. Try it—you have got that much sense?

A. It is in there but I say that is not the tool.

Mr. Rhodes: We object to that remark.

Mr. Francis: I would like to pass this around to the jury for them to see, and ask them to try it.

Q. 28. Now, Mr. Mink, I believe you said that you saw the operation of this particular instrument on the phone from your upstairs window, is that correct?

A. I saw this piece that was sitting right here put on the phone.

Q. 29. That is your north window of the motel, isn't it?

A. Yes, sir.

Q. 30. You would recognize your motel if you saw it, wouldn't you?

A. That is the north window of my apartment.

Q. 31. Does that fairly represent the front of your motel?

A. Yes, sir.

Q. 32. Does it show the window that you saw this operation from?

A. Yes, sir.

Q. 33. Will you put an "X" or circle on there . . .

A. It doesn't show the lighting.

Q. 34. I'm not asking for the lighting—I'm asking for the window?

A. This one right here.

Q. 35. Make a big circle around it?

A. (Marks photograph.)

Q. 36. Put an arrow pointing to the approximate location of the place where the telephone booth was?

A. I can't see to tell where the telephone is on that picture.

Q. 37. How about that one—can you see where your gangway is?

A. I can see through there but not enough to identify where it is.

Q. 38. Will you put a circle around your office door then and mark it Number 2?

A. (Marks photograph).

Q. 39. And will you put a big square where your breezeway is supposed to be in the picture?

A. I can put it approximately, but not exact.

Mr. Rhodes: We object to where it is supposed to be because the picture has to depict it before he can say he sees it.

The Court: Yes, not where it is supposed to be, but where it is.

Q. 40. Does the picture show where it is?

A. You can't tell exactly where it is—it is too dark there—there is no light in there.

Q. 41. Does the picture show where your roof is off the breezeway in front of your walk way?

A. Yes, sir.

Q. 42. Will you put an "R" on the roof?

A. (Marks photograph.)

Q. 43. Now, can you stand up and point out where the telephone shell is?

A. Not exactly because I can't see that good in there.

Mr. Francis: Well, I would like to file this as a portion of the proof introduced on behalf of the defendant, marked D-1.

Q. 44. You say you were standing in that north window that you have made a circle around?

A. Of my apartment.

Q. 45. And this telephone booth is located under the south room of your apartment?

A. On the south side of the motel.

Q. 46. I understand, and about six feet under the edge of that roof?

A. Something like that.

Q. 47. And you are as sure about what you saw there as you are about this not being the wrench you testified about yesterday?

A. Are you asking me to prove to you that I saw that?

Q. 48. Yes, sir, I want to know how you could see over that roof and around under that building?

A. I saw it. This fellow's car was parked direct in front of my office at the motel there.

Q. 49. Will you point it out on the picture?

A. Right out in front of the office—that one I circled there—and I was looking down with the lights on at the motel up overhead and over the office door, and the reflection of the lights on the back glass of this man's automobile and I saw him at the telephone.

Q. 50. So you did not see him as you testified previously—you saw him through the reflection of the back glass of his automobile?

A. I was looking right out the window and I saw him through the back glass of his window, the reflection of him on the telephone, and I'll prove to you right here in the Court House if you want me to.

Q. 51. Did we ask you on the examining trial how you saw it?

A. You didn't ask me that question.

Q. 52. Didn't we ask you yesterday, and you didn't say anything about any reflection on the automobile?

A. You didn't ask me that.

* * * * * * *

SHERIFF HARRIS, recalled by the defendant as if under cross-examination, testified further as follows:

Q. 1. Mr. Harris, you see this instrument that I asked you about?

A. Yes, sir.

Q. 2. When I went outside and went through the box, where did those pieces come from?

A. Out of this pasteboard box.

Q. 3. They were in the box all the time when I asked you about them this morning, weren't they?

A. Yes, they're bound to have been there, but they were not as this.

Q. 4. They have been dismantled?

A. The whole time they were in my possession, when they came up here yesterday, they were together. The wrench similar to this, the time it was in my possession, was together.

Q. 5. The same material is in that box now that came out of that automobile some several months ago, isn't it?

A. All of this material, unless something happened to some of it yesterday, I would say is the same as the day it came in my hands.

Q. 6. Has anything happened to any of it yesterday?

A. Mr. Francis, my eyes were not on that box all day. I can't possibly answer that.

Q. 7. As far as you know, that is the same instrument?

A. Without any particular reason to try and remember every detail of every wrench that is here in the Court House today, there is no way possible I could honestly answer that.

Mr. Rhodes: Judge, he says he can't answer.

Q. 8. It fits, doesn't it?

The Court: The jury has had it in their hands and tried it, but he can answer.

A. I'd say it would work in this instrument or piece of equipment.

Q. 9. I hand you a book and ask you if you have ever seen that?

A. I saw it a few minutes ago in the office there.

Q. 10. Where did it come from?

A. As far as I know, it was in this box.

Q. 11. Came out of this box, didn't it?

A. Yes, but this stuff has been rehandled and rehandled.

Q. 12. Who is in charge of it?

A. I am, but you see it has been strung out up here. The wrench that operated this piece of equipment here, when I brought it up here, it was together.

Q. 13. Who touched it besides you?

A. You know as much about it as I do—I'm not trying to give you a smart answer.

Q. 14. I know that, but is that a reversible handle on that wrench, the ratchet?

A. No, it isn't what I call a true ratchet wrench. A true ratchet wrench has little gears in here and when you work it, it has a clicking sound. This is more or less a break-down ratchet wrench where you can twist it that way or work it this way. Your ratchet wrench works up and down, this way.

Q. 15. That is one of the strongest wrenches made, isn't it?

Mr. Rhodes: We object.

The Court: Yes, Mr. Francis, it doesn't matter.

Let's go on.

Q. 16. Mr. Harris, a ratchet wrench, in order to be made reversible, has to have a switch on the top?

A. Yes, sir.

Q. 17. That is not on that wrench, is it?

A. No.

Q. 18. What does it say in the front of the book—who does it say it belongs to?

Mr. Rhodes: Objection. It was not exhibited by the Commonwealth.

The Court: You may say it was found in the box and the Commonwealth didn't present it—that's all.

By Avowal:

Q. Mr. Harris, will you just tell the Court what is in the front of the book?

A. Tom's Auto Wreckers.

Q. Does it give an address?

A. 3010 Portland.

Q. Did that book come out of the car?

A. I'm sure it did.

* * * * * * *

Mr. Wickiffe: That's the case for the Commonwealth, if it please the Court.

In Chambers

* * * * * * *

Mr. Francis: Defendant further moves that Count 3 be dismissed because the Commonwealth, in its proof, did not show that the telephone had been injured in any manner and they did not show the condition of the telephone booth at the time prior to the alleged incident. It is unknown by the defendant whether or not the lock would work, and the testimony of the maintenance man and also the security office of the telephone company, who testified that in his opinion the center of the lock had only been moved a quarter-inch, and there was no showing that said lock was in working condition prior to the time of the alleged incident.

The Court: The Court overrules the motion.

Mr. Francis: Count 4—The defendant further moves that there was no showing that Exhibit 2 is considered as a burglary tool or was used as such at any time throughout this incident other than the testimony of the man who contends he saw same through a reflection in the rear glass of an automobile.

The Court: Overruled.

* * * * * * *

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1970

70-145

THOMAS L. WOOLDRIDGE — Petitioner

versus

COMMONWEALTH OF KENTUCKY — Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

October 1970 Term

THOMAS L. WOOLDRIDGE - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

May it please the Court:

Petitioner prays that a Writ of Certiorari be issued to the Kentucky Court of Appeals.

OPINIONS BELOW

The Petitioner was tried by jury, convicted and sentenced in the Lincoln County Circuit Court at Stanford, Kentucky, by indictment charging him with violation of Kentucky Revised Statutes 433.120, the same relating to the illegal possession of burglary tools, and with violation of Kentucky Revised Statutes 433.240, the same relating to damaging private property. The opinion sustaining the conviction upon appeal to the

Kentucky Court of Appeals is cited as 459 S. W. 2d 404 (Ky.). The said opinion is attached to this Petition as Appendix A.*

JURISDICTION

The Judgment of the Kentucky Court of Appeals was entered on June 26, 1970. A timely petition for rehearing was denied on December 4, 1970. An order of this Court, dated March 5, 1971, was signed by Justice Stewart granting an extension of time within which to petition for certiorari to and including May 3, 1971.

The jurisdiction of this Court is invoked under Rule 19(a) of this Court and under the Sixth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

A. Did the trial court err in rescinding its order for the procurement of a material witness to the defense of the Petitioner, over objection of the Petitioner, and refusing a continuance of the trial, upon motion of the Petitioner, because the Petitioner could not pay the expense of procuring said witness?

B. Where the regular jury panel was exhausted with eleven jurors qualified, and where the trial court disregarded lawful procedure in selecting an additional jury panel, over objection of the Petitioner, did the

*Reference herein to the Petitioner's Appendix attached to this Petition is designated as (App. A) and when made to the supplemental appendix is designated as (App. B).

trial court err in refusing to rectify the error upon the timely motion of the Petitioner?

C. Where the trial court permitted the admission into evidence, over the objection of the Petitioner, the entire contents of an automobile in the possession of the Petitioner, and permitted direct examination by the prosecution in regard to said contents, over objection of the Petitioner, did the trial court err in then refusing the Petitioner cross-examination in respect to said contents?

D. Where property allegedly damaged by the Petitioner was subsequently found intact and then dismantled with various parts being destroyed, did the trial court err in allowing demonstrations to be performed for the purpose of substantiating that tools similar to those found in the possession of the Petitioner might have been used for an unlawful purpose?

STATUTES INVOLVED

The statutes involved in this case are as follows:

A. Section 421.250 of the Kentucky Revised Statutes (App. B. —);

B. Section 433.240 of the Kentucky Revised Statutes (App. B. —);

C. Section 433.120 of the Kentucky Revised Statutes (App. B. —);

D. Section 29.280 of the Kentucky Revised Statutes (App. B —).

STATEMENT OF THE CASE

Petitioner and a co-defendant, Ira J. Haynes, were charged by indictment with the violation of Section 433.180 of the Kentucky Revised Statutes, the same relating to dwelling house breaking; Section 433.190 of the Kentucky Revised Statutes, the same relating to storehouse breaking; Section 433.240, the same relating to damaging private property; Section 433.120(2), the same relating to possession of burglary tools; Section 437.110(2), the same relating to conspiracy.

Both plead not guilty to the said charges. The Petitioner was tried by a jury in the absence of his co-defendant. The Petitioner was convicted of Section 433.240, the same relating to the damaging of private property and Section 433.120(2) of the Kentucky Revised Statutes, the same relating to the possession of burglary tools. He was sentenced to five years' imprisonment and a five hundred dollar fine. The remaining charges were dismissed by the trial court (App. B —).

At 3:00 o'clock one morning the owner of a motel observed appellant in a public telephone booth located on the motel premises. He appeared to be tampering with the phone box and was using a ratchet-like tool. When the motel owner made inquiry, appellant informed him that he was trying to call his wife. When he departed in an automobile the license number was taken and the police were called. Later that morning appellant was arrested, and later in the day his automobile was searched under a search warrant. Various

items were found in the automobile, including tools, keys, fishing equipment, and clothing, and all were confiscated by the police (App. A, pp. 9-12; App. B —).

Prior to the trial, the court was advised that Ira Haynes, the Petitioner's co-defendant, was incarcerated in the State of Indiana. Upon finding that the said Haynes was a material witness to the Petitioner's defense, the trial court entered an order to procure the attendance of Haynes at the time of trial (App. B —). Three days prior to the trial date, the court rescinded the order for the attendance of Haynes and overruled a motion by the Petitioner for a continuance (App. B —). On November 18, 1968, the Petitioner and his attorney filed affidavits setting forth the need for Haynes' presence, their inability to secure his presence, and a request for the continuance of the trial (App. B —. Upon a hearing on the said motion, the Petitioner reaffirmed that he was financially unable to meet the demand of the court that the Petitioner pay the expenses of securing the attendance of Haynes. The court overruled the Petitioner's motion for a continuance on the grounds that the Petitioner failed to pay the said expenses and immediately ordered commencement of the trial (App. B —).

During the selection of the jury, eleven jurors were accepted when the jury panel became exhausted. The court drew one person's name from the jury wheel and summoned him for duty. The Petitioner apprised the court that an error had been committed in the securing of additional jurors and moved to discharge the jury, and said motion was overruled (App. B —).

Subsequent to the Petitioner's arrest, the entire contents of an automobile in possession of the Petitioner was confiscated by the police and admitted into evidence by the trial court. The Petitioner objected to the admission of this property, both prior to the commencement of the trial and prior to the said admission (App. B —).

In addition to various other items, the trial court permitted direct examination and an outward display of a bag of coins obtained from the automobile, even though no coins or money were alleged to have been taken and none were taken (App. B —). However, the trial court would not permit the Petitioner to cross-examine on the admission of a bank book belonging to the Petitioner and indicating he was in the automobile wrecking business (App. B —).

Over the objection of the Petitioner (App. B —), the trial court permitted the admission into evidence a telephone which the prosecution contended was damaged by the Petitioner prior to his arrest. The telephone was displayed to the jury in a dismantled condition and with the lock drilled out and completely destroyed (App. B —). The trial court also permitted, over objection of the Petitioner, various demonstrations to the jury as to how certain tools found in the automobile might have caused the damage. Testimony by an agent of the company who owned the telephone subsequently testified that he had drilled the lock and dismantled the instrument. The agent further testified that subsequent to the Petitioner's arrest he found the telephone intact with something wrong with the lock

(App. B —). Further testimony revealed that the tools were incapable of causing the alleged damage (App. B —).

The Petitioner moved for verdict of acquittal on each of the objections enumerated above (App. B —). The Petitioner also stated each of the above objections as grounds for a new trial (App. B —).

REASONS FOR GRANTING WRIT

Certiorari is sought by the Petitioner on the grounds that his conviction in the trial court is in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and the affirmance thereof by the Kentucky Court of Appeals is in direct conflict and contrary to the decisions of this Court. This petition deals with a matter of great importance involving basic fundamental constitutional rights to a fair trial.

The trial court refused the Petitioner a continuance of his trial even though the court failed to secure the attendance of a material witness. The trial court based its refusal on the grounds that the Petitioner failed to provide the expenses in obtaining the witness. Section 421.250 of the Kentucky Revised Statutes clearly provides for the securing of such witnesses by the trial court and for the expenses to be paid by the State (App. B —). Denial of the continuance and the failure of the court to secure the only material witness available to the Petitioner is clearly contrary to *Barber* v. *Page*, 390 U. S. 719.

Notwithstanding the opportunity of the trial court to rectify the error in selecting the additional jury panel, it refused to do so, and placed the Petitioner in the position of accepting the single member or speculate on someone yet unknown. This deviation of settled procedure, set forth by Section 29.280 of the Kentucky Revised Statutes (App. B —) are definitely repugnant to the principles of this Court. *Fahy* v. *Connecticut,* 375 U. S. 85; *Estes* v. *Texas,* 381 U. S. 532.

The trial court's denial of allowing the Petitioner to cross-examine regarding evidence presented by the prosecution is equally as repugnant as allowing the admission and display of altered evidence with no degree of control by the trial court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

BRITTON P. FRANKLIN
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Louisville, Kentucky 40202

Attorney for Petitioner

APPENDIX A

COURT OF APPEALS OF KENTUCKY

RENDERED: JUNE 26, 1970

THOMAS L. WOOLDRIDGE - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - *Appellee*

Appeal from Lincoln Circuit Court
Honorable Delbert Eagle, Judge

OPINION OF THE COURT BY COMMISSIONER CLAY—AFFIRMING

Appellant was convicted of possessing burglary tools and damaging property. He was sentenced to five years in the penitentiary and fined $500. He presents several grounds for reversal which will be taken up after a brief statement of the facts.

At 3:00 o'clock one morning the owner of a motel observed appellant in a public telephone booth located on the motel premises. He appeared to be tampering with the phone box and was using a ratchet-like tool. When the motel owner made inquiry, appellant informed him that he was trying to call his wife. When he departed in an automobile the license number was taken and the police were called. Later that morning appellant was arrested, and later in the day his automobile was searched under a search warrant. Tools were found which could be used for bur-

glarizing purposes and also there was found a bag containing change in the amount of $123.

Appellant's first claim of error is that the court erroneously denied him a continuance because of the absence of a witness. This witness was in the United States penitentiary in Indiana. When he was incarcerated there is not shown. It does not appear that appellant sought to procure his attendance under KRS 421.250, nor did appellant make an attempt to take his deposition. We do not believe the trial judge abused his discretion in view of the lack of diligence on appellant's part. See American Mutual Liability Ins. Co. v. Hartman, 254 Ky. 712, 78 S. W. 2d 429 (1934), and McCloud v. Commonwealth, Ky., 333 S. W. 2d 264 (1960). In any event, it does not appear the absence of this witness was prejudicial. He accompanied appellant in the automobile and his testimony would have been that the parties stopped at the motel for the purpose of making a long-distance telephone call. The motel owner testified that appellant had stated he was trying to make a telephone call. This additional bit of cumulative evidence could scarcely have had significance. We find no abuse of discretion.

It is next contended the trial court erred in selecting the last juror. After 11 jurors had been seated the panel was exhausted and the court drew only one name from the jury wheel. In Brock v. Commonwealth, Ky., 430 S. W. 2d 333 (1968), we held that under KRS 29.280 and RCr 9.30 the proper procedure would have been to draw two. However, appellant made his objection by moving "to discharge the entire panel". The court's procedure was not a ground for discharging the entire panel and that motion was properly overruled. Threafter appellant accepted this last juror and we do not believe he can now assert reversible error when the court properly overruled the only motion he made.

It is next contended the search of appellant's car was illegal because it was made several hours after it was taken

from appellant's possession. He cites a number of cases wherein we have held that a search of an automobile *without* a warrant is illegal if made any substantial time after the owner is separated from it because such a search must be as an incident to an arrest and in the "immediate presence" of the person arrested. Here the search was made pursuant to a valid search warrant. When appellant had last been in his automobile was immaterial with respect to the validity of the search. See United States v. Allen, D.C., Ky., 147 F. Supp. 955 (1957).

It is next contended the court erred in denying appellant the right to cross-examine the sheriff who made the search with respect to a bank deposit book found in the automobile. By avowal it appears that this book was issued for an account in the name of "Tom's Auto Wreckers". We are unable to discern in what respect this passbook had any relevance to the issues on trial. It was not connected up with anything by any evidence in the case. We find no error here.

It is next contended the charge of damaging property should have been dismissed because the condition of the telephone equipment prior to the time appellant allegedly undertook to use it was not shown. It was later found in a damaged condition. In view of the fact that this was a public telephone at a motel, it is extremely likely that if it had been damaged prior to the time appellant was seen tampering with the phone it would have been observed and reported. In addition, appellant was seen near the telephone with a mechanical tool which could cause the damage. There was certainly sufficient evidence to support a finding that the damage was caused by appellant.

It is next contended the court erroneously allowed the introduction in evidence of the telephone equipment allegedly damaged. When it was exhibited it had been taken apart and was not in the condition it was when removed from the motel. The witness who introduced this exhibit

explained what had been done to it since its removal. No one intimated that appellant was responsible for the dismantling of the equipment. We find nothing prejudicial to appellant here.

It is finally contended the court should not have permitted the introduction in evidence of the bag of coins and other articles found when the search of the automobile was made. It is said that no coins were taken from the telephone box involved, which of course is true. However, this item of evidence was relevant on the issue of what use was made of appellant's tools. Items other than tools may have been irrelevant but appellant does not point out what they were and they could have had no influence on the verdict.

The judgment is affirmed.

All concur.

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SUPREME COURT, U. S.
SEP 20 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October 1970 Term

70-145

THOMAS L. WOOLDRIDGE ..... Petitioner

versus

COMMONWEALTH OF KENTUCKY ..... Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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Three copies of the within Brief were served upon counsel for Petitioner by mail this 22nd day of September 1971.

Laura L. Murrell

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IN THE

Supreme Court of the United States

October 1970 Term

THOMAS L. WOOLDRIDGE ---------- *Petitioner*

v.

COMMONWEALTH OF KENTUCKY ---------- *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE

Petitioner was tried and convicted of damaging private property (Ky. Rev. Stat. 433.240) and possession of burglary tools (Ky. Rev. Stat. 433.120(2)) and given a five year prison sentence and a $500 fine.

The evidence on the trial that led to petitioner's conviction consisted primarily of the testimony of J. M. Mink, the owner and operator of a small motel near Stanford, Kentucky. Mr. Mink, who lived in an apartment in the motel, testified that he was awakened about 3:00 a.m. on the morning of April 12, 1968, by the sound of a car door being opened. He looked out his window and saw petitioner and another man identified as Ira J. Haynes get out of a car. He saw petitioner take a ratchet like tool out of

his car and walk over to a pay phone booth that was located on the first floor of the motel. Mr. Mink went downstairs to the phone booth. Petitioner then had the tool attached to the phone. When Mr. Mink walked up, he tried to hide the tool under his jacket and informed Mr. Mink that he was trying to call his wife. Mr. Mink turned and walked to a place where petitioner could not see him. Petitioner then pulled the device off the phone and ran and put it under the front seat of the car and drove away very rapidly. Mr. Mink got the car license number and called the police (Lincoln Circuit Court, Transcript of Evidence, pp. 19-23). As a result of this phone call, petitioner and Ira J. Haynes were picked up in an automobile bearing the same license number in the next town down the road and brought back to Stanford. A search warrant was obtained for the car, and a tool such as Mr. Mink described was found in the car along with a bag of coins. Mr. Mink identified the tool found in the car as the one he saw petitioner using, and he identified petitioner.

Both petitioner and Haynes were charged with various crimes arising out of the transaction. Sometime in October, petitioner apparently realized that his co-defendant was in a federal penitentiary in Indiana and would be unable to testify on his behalf in this trial. At that time his attorney got the circuit judge to enter an order that Ira J. Haynes was an essential witness and should be brought back. This was apparently preparatory to making arrangements with the federal authorities to bring Mr. Haynes back for the trial. However, an important snag in this plan developed. On November 14, three days before the scheduled trial, Mr. Haynes had not been returned to Lincoln County for the trial. At that time, petitioner made a motion for a continuance which stated as follows:

> "Ira J. Hanes, is now in the United States Penitentiary Terre Haute, Indiana; that said Ira J. Hanes is an essential witness to the presentation of the case for defendant herein, *that the Court has heretofore, on Oct. 19, 1968, ordered that said Ira J. Hanes be brought to*

> *Lincoln County for the purpose of testifying as a witness for this defendant; that the county officials, through its County Attorney has verbally declined and refused to pay the cost of returning said Ira J. Hanes to Lincoln County for the purpose of testifying in this matter; that this defendant is without sufficient funds to pay the cost of returning said Ira J. Hanes to Lincoln County;* that the testimony of said Ira J. Hanes can be secured at a future time; that the testimony of Ira J. Hanes is material to the defense of this defendant and could well effect the outcome of the trial; that the testimony which Ira J. Hanes would give is unavailable from any other source; and that this defendant has exercised good faith and deligence in attempting to secure the testimony of Ira J. Hanes; *that to require this Court to pay the cost of returning said Ira J. Hanes to Lincoln County for the purpose of testifying in the trial of Thomas C. Wooldridge would be placing an undue burden on this defendant, especially where said Ira J. Hanes is a co-defendant and charged with the same crime as this defendant; and the county should be ordered to pay the cost of returning this witness to Lincoln County* for the purpose of testifying in the matter as they would in all probability try said Ira J. Hanes on the next occasion he is present at Lincoln County." T.R. pp. 13-14. (Italics Added; underlining appears in official transcript.)

This motion did not state that petitioner was indigent, but simply stated that it was unfair to require him to pay the cost of transporting the witness when the state would then undoubtedly also choose to try him and take advantage of petitioner's expense. This motion was not accompanied by an affidavit, required by Kentucky Criminal Rules 9.04, stating what the witness would say and that such evidence was material. This motion was overruled on November 15. (Tr. of Record, p. 16). On the morning of the trial, an affidavit of the defendant was filed which stated as follows:

> "Comes the Affiant, Thomas C. Wooldridge, and after being duly sworn, states as follows:

1. That he is the defendant in the case of Commonwealth vs. Thomas C. Wooldridge in the Lincoln Circuit Court, Criminal Action No. 6363.

2. That the only witness in his behalf in this matter is Ira J. Hanes:

3. That he has been informed that said Ira J. Hanes is confined in the United States Penitentiary at Terre Haute, Indiana;

4. That he understands that it would be necessary for him to pay the expenses of said Ira J. Hanes, plus the expenses of a Federal Marshall to and from Stanford, Kentucky, for the purpose of having said Ira J. Hanes present to testify in his behalf.

5. That he understands that the expenses would be approximately $250.00 or $300.00;

6. That he is without funds with which to pay said expenses;

7. That said Ira J. Hanes is an essential and material witness to the presentation of Affiant's defense in this matter.

8. That if said Ira J. Hanes were present, he would testify that they stopped at the Golden Gate Motel for the purpose of making a long distance telephone call;

9. That the Affiant does not believe that he would get a fair and impartial trial without the presence of said Ira J. Hanes to personally testify and that he does not believe that he can get a fair presentation of his defense to the jury by the reading of an Affidavit as to what Ira J. Hanes would testify if present to testify in person.

WITNESS the hand of Affiant, this the 18th day of November, 1968."
(Transcript of Record, pp. 16-17).

This affidavit was considered by the Court in chambers prior to the trial and overruled, the trial judge stating as follows:

"The defendant further filed an affidavit that the co-defendant Ira J. Haynes was in the Federal penitentiary at Terre Haute, Indiana, and made the motion for the

Commonwealth to transport said Haynes to testify on the trial because the said Thomas Lee Wooldridge did not have funds in order to bring him to testify on his behalf. Whereupon, the Court, after reading the affidavit and both motions for continuance, overruled the motions for continuance, to all of which the defendant objected Said ruling was made after he had already entered an Order in October directing that the said Ira Haynes be returned to Lincoln County not later than November 12, 1968, and confined in the Lincoln County jail pending the trial of the above styled action. THE COURT: He is able to hire two attorneys; he is able to pay a bonding company to make a $10,000.00 bond. He has had plenty of notice as to the time for his trial. If he is able to hire two attorneys to represent him and able to pay a bondsman to come in here and make a $10,000.00 bond, that would refute his statement in the affidavit that he is not financially able to secure this witness who is in the federal pen in Indiana. He has made no effort on his own part to obtain the witness and he has relied wholly and solely upon the Court to bring him back here as a defense witness. If he is financially able, and everything would indicate that he is, it is his duty to procure his own witnesses and to have them here. For all of those reasons, the Court has refused to continue this case. There is no evidence and there is nothing that this man has done or said that would indicate that if this case were put off to next court he would be in any better position so far as this witness is concerned than he is right now, because he has made no effort on his own part to have the witness here. The Court, in response to the request, made an investigation of the federal officials necessary to bring the witness back here, and that is about as far as the Court feels it can go."

(Tr. of Evidence. pp, 1-2).

In response to this and a statement by the Commonwealth Attorney that the petitioner was solvent, his attorney stated:

". . . Further, by the defendant Thomas Lee Wooldridge paying the cost to bring the other man back to

testify for him, he would, in turn, be paying the cost of transporting him to the State of Kentucky for a trial of the within action, which the defendant Thomas Lee Wooldridge should not be required to do by any action of the Commonwealth." (Tr. of Evidence, p 6).

No further statements were made by petitioner's counsel that would in any way indicate that petitioner was in fact indigent and could not obtain the presence of the witness, or that the witness could testify to anything of any more significance than the statement, set out in the affidavit, that petitioner was stopping at the motel to make a phone call.

During the selection of the jury, the panel was exhausted after the selection of eleven jurors. The judge ordered one name drawn from the wheel and summoned. Petitioner's counsel objected to this procedure and moved that the entire panel be discharged. (Tr. of Evidence, p. 14).

At the very end of the entire trial the following exchange occurred:

"Q18 What does it say in the front of the book – who does it say it belongs to?

Mr. Rhodes: Objection. It was not exhibited by the Commonwealth.

The Court: You may say it was found in the box and the Commonwealth didn't present it – that's all.

BY AVOWAL:

Q. Mr. Harris, will you just tell the Court what is in the front of the book?

A. Tom's Auto Wreckers.

Q. Does it give an address?

A. 3010 Portland.

Q. Did that book come out of the car?

A. I'm sure it did.

Mr. Francis: Mark that D-2, as introduced through the Sheriff of Lincoln County.

END OF AVOWAL." (Tr. of Evidence, pp. 116, 117).

The defendant made no effort to introduce this evidence by direct evidence during his case. In fact, the defendant did not introduce any evidence at all.

The other evidence that petitioner complains of is the testimony of Ken Williams, an investigator from the telephone company who testified to the condition of the phone the day after petitioner's early morning visit to it, and to the nature and use of the tool Mr. Mink saw petitioner with, and to the nature and use of other tools found in petitioner's car. While, it is true, as petitioner asserts, that one of the tools was inoperative at the time of the trial, the witness testified that it was operative at the time the grand jury indicted petitioner but that a small part was missing at the time Mr. Williams testified. Mr. Mink then testified that he had seen petitioner fooling with the exhibit during a recess in the trial. This testimony appears at Tr. of Evidence, pp. 86-111.

REASONS FOR NOT GRANTING WRIT OF CERTIORARI IN THIS CASE

Petitioner asserts four issues as grounds justifying the issuance of certiorari in this case. Three of these issues are absolutely trivial and the fourth is without merit. Petitioner's claim that the judge improperly impaneled the jury could not conceivably justify the granting of certiorari. True, there was a technical violation of the statute – one name was picked from the jury wheel rather than two. But the petitioner moved that the entire panel be struck rather than that another name be drawn. The trial judge refused to do this, and the petitioner then accepted the jury. The Court of Appeals of Kentucky held that petitioner thereby failed to preserve error on this point. The

drawing of one name rather than two was a technical violation of a Kentucky statute, however, there was nothing inherently unfair about it and it raises no federal constitutional ground, and was not preserved in any event.

Petitioner next contends that he was not allowed to cross-examine the sheriff about a bank pass book found in petitioner's car. The Court of Appeals held that "We are unable to discern in what respect this passbook had any relevance to the issues on trial." Petitioner did not explain to the trial court how this might be relevant, and did not attempt to introduce it on direct. This again simply does not rise to any kind of a constitutional issue.

Petitioner's third contention is that the damaged telephone was introduced even though it had been dismantled during testing. The witness who introduced the exhibit explained exactly how this dismantling was done. There was no error here, let alone constitutional error.

Petitioner's fourth contention is that the trial court improperly denied petitioner a continuance until his co-defendant Ira J. Haynes could be obtained. The second half of this motion was to require the county to pay for the obtaining of Ira J. Haynes. The simple fact, as is set out in the statement of facts, is that the court had entered an order and taken steps to obtain the presence of Ira J. Haynes, but petitioner had refused to pay the cost of obtaining the witness. Petitioner continued to refuse to pay the cost and had not shown that he was financially unable to do so. He just contended that it would be unfair to require him to do so, since the county might choose to try Haynes while he was back in the Commonwealth. The failure of the state to provide a material witness to an indigent defendant who could not otherwise obtain such a witness might present a serious constitutional question even where the obtaining of the witness would not be by compulsory process but by cooperation with federal prison officials, *Barber v. Page*, 390 U. S. 719, 210 L.Ed. 2d 255, 88 S. Ct. 1318 (1968). However, in this case such an issue is not presented for several reasons. First, it is not shown

that the petitioner was indigent. Indeed everything in the record indicates that he was not. He had retained counsel. He was out on $10,000 bond prior to the trial and pending appeal. He took a direct appeal with retained counsel and paid the costs on that appeal. Even this petition for certiorari is not in forma pauperis. Secondly, petitioner made no showing that the missing witness was material. His affidavit said that the witness would testify that he had stopped to make a phone call. Mr. Mink testified that petitioner told him that. An accomplice's statement to the same effect in the face of the overwhelming evidence to the contrary could not have been material. Petitioner did not ask to have his statement of what Haynes would have said read to the jury, but the court would undoubtedly have allowed such had he asked. Under these circumstances, no possible constitutional question is presented. *Slawek v. United States*, 413 F. 2d 957 (1969); *Speers v. United States*, 387 F.2d 698 (1967), cert denied, 291 U.S. 934; *Fequer v. United States*, 302 F. 2d 214 (1962), cert denied, 371 U.S. 872.

CONCLUSION

For the foregoing reasons, this petition shows no reason why the decision of the Kentucky Court of Appeals presents a constitutional question of first impression, or is in conflict with prior decisions of this Court under Rule 19 of the Supreme Court Rules, the petition should therefore be dismissed.

Respectfully submitted,

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